Bank Bumiputra (M) Bhd v Aik Lee Feedmill Co Sdn Bhd & Ors

HIGH COURT (MELAKA) — SUIT NO 22–80 OF 1998
SURIYADI J
29 JANUARY 1999

Civil Procedure *— Summary judgment — Judgment in default — Whether defaulting party should apply to set aside default judgment or file an appeal — Rules of the High Court 1980 O 14 r 11 & O 56 r 1*

The plaintiff ('the respondent') — upon an application for summary judgment — obtained judgment in default of appearance against the defendants ('the appellants'). Consequently, the appellants filed an appeal pursuant to O 56 r 1 of the Rules of the High Court 1980 before the High Court. The respondent posed a preliminary objection, in that the proper course of action was a setting aside application, pursuant to O 14 r 11, rather than through the process of an appeal.

Held, striking out the appeal with costs:

The appellants should have alluded to the specific provision located within the purview of O 14, rather than through the process of an appeal. By sidestepping this specific provision, the respondent would be prejudiced as he would be deprived of one level of appeal (see pp 530I and 531A).

[Bahasa Malaysia summary

Atas satu permohonan untuk penghakiman terus, plaintif ('penentang') telah memperolehi penghakiman ingkar kehadiran terhadap defendan-defendan ('perayu-perayu'). Berikutnya, perayu-perayu telah memfailkan rayuan menurut A 56 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 di hadapan Mahkamah Tinggi. Penentang-penentang mengemukakan bantahan permulaan, iaitu tindakan yang wajar adalah permohonan untuk mengetepikan penghakiman ingkar, menurut A 14 k 11, dan bukan melalui proses rayuan.

Diputuskan, membatalkan rayuan dengan kos:

Perayu-perayu seharusnya telah merujuk kepada peruntukan spesifik dalam lingkungan A 14, dan bukan melalui proses rayuan. Dengan mengelakkan peruntukan spesifik ini, penentang akan terjejas kerana ia akan kehilangan satu tahap rayuan (lihat ms 530I dan 531A).]

Notes

For cases on summary judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4372–4778.

Cases referred to

Attorney-General v Brown [1920] 1 KB 773 (refd)
Bank of Commerce Bhd lwn Limma Enterprise Sdn Bhd & Lain-lain [1996] 4 MLJ 201 (refd)
Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors [1996] 5 MLJ 51 (refd)
Development & Commercial Bank Bhd v Cheah Theam Swee [1989] 2 MLJ 496 (refd)
Hession v Jones [1914] 2 KB 421 (refd)
Evans v Bartlam [1937] AC 473 (refd)
Majlis Perbandaran Melaka Bandaraya Bersejarah v Chin Nyok Lin, Pentadbir Harta Pesaka Loke Yoon Hing, si mati & Ors [1996] 2 AMR 2138 (refd)
St Nazaire Co, Re (1879) 12 Ch D 88 (refd)
Turquand v Board of Trade (1886) 11 App Cas 286 (refd)

Legislation referred to

Rules of the High Court 1980 O 13 r 8, O 14 r 11, O 32 r 6, O 35 rr 1(2), 2(1), O 42 r 13, O 56 r 1

Karen Cheah Yee Lynn (*Nik Hussain & Partners*) for the plaintiff/respondent.

Tan Lip Yip (*Tan Lip Yip & Co*) for the fourth, fifth and sixth defendants/appellants.

Suriyadi J: The plaintiff applied for summary judgment before the senior assistant registrar on 30 October 1998, with both parties represented by counsel. The case was stood down the first time around, as neither the defendants nor their counsel were present. It was called up again later but with the same result. The senior assistant registrar, not unexpectedly ordered that judgment in default of appearance be entered against the defendants.

Having had knowledge of the outcome of that case, and being dissatisfied with it, the defendants ('the appellants') filed an appeal before me. Before the merits of the substantive case could be heard, the plaintiff ('the respondent') posed a preliminary objection, in that the procedure undertaken by the appellants was wanting. It was ventilated that the proper course of action was a setting aside application, pursuant to O 14 r 11 of the Rules of the High Court 1980, rather than through the process of an appeal. The respondent submitted that as a specific provision had been statutorily provided for to deal with matters of this nature under the Rules of the High Court 1980, an appeal pursuant to O 56 r 1 definitely was procedurally wrong.

Having heard the submissions of both parties, I agreed with the view of the respondent, primarily on the ground that the appellants should have alluded to the specific provision located within the purview of O 14, rather than through the process of an appeal. The Rules of the High Court 1980 is well equipped to deal with matters of this nature. Furthermore, by sidestepping this specific provision, the respondent would be deprived of

A one precious level of appeal, ie from three tiers to two. I now explain my grounds in some detail. To avoid confusion, the dissertation is limited to default judgments that emanate from the registrar and not from High Court judges.

Specific provisions are littered in the Rules of the High Court 1980, to
B deal with specific problems relating to setting aside applications, eg the abovementioned O 14 r 11 for default judgments obtained in summary judgments; O 13 r 8 where the order was obtained due to default of appearance to a writ; O 32 r 6 where an order was obtained ex parte; O 35 r 2(1) where there was non-attendance of one party, etc. Regarding the general ground rules to deal with these applications, O 42 r 13 is highly
C relevant. Therefore, every specific situation has a unique provision meant to address it. Order 56 r 1, which is the machinery meant to deal with appeals emanating from certain kinds of judgments is no exception. Whether this is a general or catch-all provision, is irrelevant for the current problem, as I do not desire to proceed on that line of argument.

D To comprehend my decision, I will rationalize it by initially discussing O 35 of the Rules of the High Court 1980. Order 35 r 1(2) provides that when one party does not appear, the judge may proceed with the trial of the action or any counterclaim in the absence of that party. As provided under O 35 r 2, the court may later set aside that particular judgment pursuant to the application of the absent party. The discretion to set aside, which is
E absolute, is based on the principle that as the court has not had the opportunity to hear the case on its merits, the court only possess that power to undo an order which was obtained merely due to the non-adherence of some procedural rules (*Mallal's Supreme Court Practice* (2nd Ed) Vol 1 p 84; *Majlis Perbandaran Melaka Bandaraya Bersejarah v Chin Nyok Lin, Pentadbir Harta Pesaka Loke Yoon Hing @ Loke Yoon Heng, si mati & Ors* [1996]
F 2 AMR 2138). Lord Atkins in *Evans v Bartlam* [1937] AC 473 at p 480 had occasion to say:

> The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure
G to follow any of the rules of procedure.

An application to set aside a default judgment — begun by summons generally supported by affidavits (and where the mistake is too apparent, none will be required) — is simple, straightforward and under no circumstances difficult to undertake. Leave is not necessary prior to such an
H application, and courts may even entertain late applications in certain circumstances.

To complete the legal scenario, Parliament in all its wisdom has also sufficiently legislated provisions dealing with regular judgments, orders or decisions obtained from a registrar, where both parties are present.
I Unfortunately, due to the construction of these provisions, some consternation and confusion has arisen. Order 14 r 11 specifically provides that 'any judgment given against a party who does not appear ... may be set aside' on such terms as the court thinks just. On the other hand, such a judgment seemed to be similarly capable of being dealt with by O 56 r 1.

This provision provides for appeal to a judge in chambers from any judgment, order or decision of the registrar. As the word 'any' has been promulgated by Parliament, an impression of inexhaustibility, advertently or inadvertently has been created, thus permitting a default judgment to fit nicely into this phrase of 'any judgment, order or decision'. An untrained mind therefore, by virtue of the structure of the material provisions, may be excused if he were to conclude that any aggrieved party has a right of choice, in terms of the type of course of action to be undertaken. An experienced lawyer certainly will not be excused.

Since this began as a summary judgment case, anything connected to this kind of judgment must necessarily be resolved within the ambit of O 14 of the Rules of the High Court 1980. Only when there is a lacuna or dearth of particularities, may reference or assistance be sought from other sources. Within this order is found the abovementioned O 14 r 11, promulgated specifically to deal with matters relating to setting aside of judgments obtained against parties who did not appeal at the hearings. To be successful in an application to set aside such an order, a satisfactory explanation must be supplied by the applicant (*Development & Commercial Bank Bhd v Cheah Theam Swee* [1989] 2 MLJ 496). Zakaria Yatim J in the latter case, endorsed *Evans v Bartlam*, when he opined that eventhough that case was related to a default of appearance order [O 13 Rules of the High Court 1980], the principles applied equally to an application under O 14 r 11. One cannot, in a slipshod way, ignore the relevant provisions and interchangeably advert to the inappropriate ones. This view was similarly held by Abu Samah JC (as he then was) in the case of *Bank of Commerce Bhd lwn Limma Enterprise Sdn Bhd & lain-lain* [1996] 4 MLJ 201. The court there had to decide whether the defendants could make an application under O 14 r 11 to set aside the summary judgment, obtained in the presence of both parties, rather than by filling an appeal to address his grievances. The judge answered in the negative. In other words, the correct platform was via an appeal. Kamalanathan Ratnam JC in *Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors* [1996] 5 MLJ 51 approached the matter in a slightly different way, in that if there were specific provisions available for the setting aside of an order, then such an order could not be granted within the context of an appeal. He then dismissed the appeal. As far as I was concerned, the matter should be nipped in the bud hence the striking out of the appeal without even considering the merits of the case. This was so as the appellant had erred when it did not advert to O 14 r 11, in the light of its availability and suitability to deal with the matter at hand.

It could thus be safely concluded that the separation and delienation of provisions were deliberately done by the legislators to ensure certainty, and to avoid collision with other provisions. To disregard the obvious, would mean that the specific provisions in the Rules of the High Court 1980 were being dealt with in isolation rather than as a whole. To use the words of P St J Langan, 'it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself' (*Maxwell on Interpretation* at p 58; *Attorney-General v Brown* [1920] 1 KB 773; *Turquand v Board of Trade* (1886) 11 App Cas 286, per Lord Blackburn at p 291).

A Apart from the above reasoning, I was also in total agreement with the respondent's view that by so skipping O 14 r 11, her client's interest was prejudiced. This was so, as the approach of the appellant reduced the respondent's statutory entitlement of a minimum of three appeals, to that of two. For clarification, if an aggrieved party submits a setting aside application, the matter for obvious reasons, will revert back to the same B senior assistant registrar, who will review her decision. In that circumstance, it is not a question of an adjudicator rehearing a case heard much earlier, but to permit the absented party an opportunity to explain satisfactorily his absence, and thereafter adjudge whether to set side or not that order. No question of infringement of jurisdiction will arise here (*Re St Nazaire Co* C (1879) 12 Ch D 88; *Hession v Jones* [1914] 2 KB 421). In the event that default judgment is not set aside, the losing party of the application may then file the first tier appeal to the High Court, followed by a second opportunity before the Court of Appeal, and eventually the Federal Court. By this mode of action, numerically the aggrieved party therefore has a right to a three tier appeal. If the matter were to be heard at its inception as an D appeal before the High Court, then the chagrined party, assuming that it is the respondent, will be left only with two tiers of appeal, viz the Court of Appeal and the Federal Court. On that interpretation, the respondent's statutory interest or right of appeal, must be construed as having been prejudiced.

E On the above factors and dissemination of the law, I had no hesitation in agreeing with the preliminary objection and thenceforth striking out the appeal with costs.

Appeal struck out with costs.

F Reported by Loo Lai Mee

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